

No. 98 536 SEP 29 1998

In The OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1997

TOMMY OLMSTEAD, Commissioner of the Department
Of Human Resources of the State of Georgia,
RONALD C. HOGAN, Superintendent of Georgia
Regional Hospital/Atlanta, and EARNESTINE
PITTMAN, Executive Director of the
Fulton County Regional Board,

Petitioners,

v.

L.C. and E.W., each by JONATHAN ZIMRING
as guardian ad litem and next friend,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Georgia provides for the treatment and habilitation of mentally disabled persons in two main types of residential settings: institutional facilities, and a wide range of settings called "community placements." The State's choice of setting for an individual requiring public care depends on the individual's mental condition, on the fact and extent of his dangerousness and inability to care for himself, and on fiscal and administrative considerations.

The questions presented are:

1. Whether the public-services portion of the federal Americans with Disabilities Act compels the State to provide treatment and habilitation for mentally disabled persons in a community placement, when appropriate treatment and habilitation can also be provided to them in a State mental institution.
2. If that portion of the Act is so construed, whether it exceeds the enforcement power granted to Congress in Section 5 of the Fourteenth Amendment.

PARTIES BELOW

The parties to the proceedings in the Court of Appeals and in the District Court were as listed in the caption, except that pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Ronald C. Hogan has been automatically substituted for Richard Fields, due to Hogan's succeeding Fields as Superintendent of Georgia Regional Hospital at Atlanta.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tommy Olmstead, Ronald C. Hogan, and Earnestine Pittman respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on April 8, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *L.C. v. Olmstead*, 138 F.3d 893 (1998), and is printed as Appendix A, *infra*, 1a. The order on the merits by the United States District Court for the Northern District of Georgia, No. 1:95-CV-1210-MHS, 1997 WL 148674 (Mar. 26, 1997), is printed as Appendix B, *infra*, 31a.

JURISDICTION

The court of appeals entered its opinion and judgment on April 8, 1998 (App. A, *infra*, 1a) and entered its denial of Petitioners' Motion For Rehearing and Suggestion of Rehearing En Banc on July 1, 1998 (App. C, *infra*, 43a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994). 28 U.S.C. § 2403(a) (1994) may apply and notifications required by Supreme Court Rule 29.4(b) have been made. The court of appeals did not certify the question to the Attorney General pursuant to 28 U.S.C. § 2403(a) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. 14:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 12132 (1994) (the Americans With Disabilities Act of 1990):

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

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STATEMENT

A. Claims and Facts

Respondent L.C. brought this action in May 1995, and Respondent E.W. intervened in January 1996. Both

Respondents were patients at Georgia Regional Hospital at Atlanta, a State residential facility for the care of persons with mental illness, mental retardation, or a substance-abuse condition. For many years before this action, both patients had been hospitalized frequently for treatment.

In the complaints, the patients alleged that they were not receiving minimally adequate treatment in the facility, in violation of their rights under the Fourteenth Amendment. They also asserted that they "could" be treated in the community, that such treatment was "appropriate" for them, and, therefore, that the Americans With Disabilities Act (the "ADA") required the provision of such treatment.

The patients sought a declaratory judgment as well as an injunction requiring the officials to provide them with publicly financed community residential placements and professional services. The State officials answered both complaints by denying that the patients had failed to receive minimally adequate treatment at the facility and denying that they required community-based services.

The parties developed an extensive record below. It establishes that after their admission to and treatment at Georgia Regional Hospital at Atlanta, the patients both stabilized to the point that they could have been discharged to a highly structured community placement. However, they continued to receive treatment at the facility and they were not initially discharged; the State asserted that this was due to a lack of funding for the

community placements. During the course of the litigation, both patients were provided with community placements, as funding became available.

B. Georgia's Provisions for Care

This case arose in the context of Georgia's elaborate legal and fiscal framework for delivering mental health, mental retardation, and substance abuse services. O.C.G.A. Chs. 37-1 through 37-7, 37-9 (1995). Georgia law establishes a coordinated system of state, regional, and community agencies for implementing and managing this delivery. O.C.G.A. §§ 37-1-20, 37-2-1 to 37-2-6.1 (1995).

The statutes detail the broad spectrum of programs and placements in which services may be delivered. That spectrum includes State hospitals and other institutional facilities, various community placements, as well as outpatient treatment. *See, e.g.*, O.C.G.A. § 37-1-2 (1995) (providing for a "comprehensive range of quality services").

Georgia law also sets substantive standards for both voluntary and involuntary treatment. For both types of treatment, State law establishes a preference for treatment in the least restrictive setting, O.C.G.A. §§ 37-3-161, 37-4-121 (1995), but only "within the limits of state funds specifically appropriated therefor." O.C.G.A. §§ 37-3-1(10), 37-4-2(10) (1995).

C. Proceedings Below

After the close of discovery, the parties filed cross-motions for summary judgment on the whole case. The patients' primary argument was that the sense of the

ADA is embodied in a regulation calling for provision of public services in the "most integrated setting," and that mental health and mental retardation facilities are *per se* a "segregated" setting. 28 C.F.R. § 35.130(d) (1997) (App. D, *infra*, 45a). The State officials argued that, at the threshold, the ADA requires a showing of causation (i.e., a showing that the State's failure to provide community services occurred due to the patients' disabilities), and that this showing had not been made. They asserted also that the "integration" regulation, according to its history and intent, does not compel community treatment.

The district court granted the patients' motion on the ADA claim and ordered the State to place and maintain the patients in an "appropriate" residential community setting, based on its conclusion that "under the ADA, unnecessary institutional segregation of the disabled constitutes discrimination *per se*, which cannot be justified by a lack of funding."¹

On appeal, the court of appeals affirmed the district court's judgment, but then it also remanded the case for factual findings on the State's funding defense. App. A, *infra*, 1a, 4a. The court of appeals at the outset concluded that "[b]y definition where, as here, the State confines an individual with a disability in an institutionalized setting when a community placement is appropriate, the State has violated the core principle underlying the ADA's integration mandate." App. A, *infra*, 8a.

¹ App. B, *infra*, 31a. The district court found that the patients' claims were not moot generally, as they were capable of repetition but would evade review. *Id.* at 35a.

The court then declared that under the ADA lack of funds was not a defense except "in the most limited of circumstances." *Id.* at 20a. It held that "where, as here, the evidence is clear that all the experts agree that, at a given time, the patient could be treated in a more integrated setting, the ADA mandates that it do so at that time unless placing that individual would constitute a fundamental alteration in the state's provision of services." *Id.* at 24a. The court of appeals underscored the magnitude of the officials' burden on remand by stating that "[u]nless the State can prove that requiring it to make these additional expenditures [for the community placements] would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service it provides, the ADA requires the State to make these additional expenditures." *Id.* at 29a.

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit's Interpretation of the ADA Conflicts With the Second and Seventh Circuits' Interpretation of Its Predecessor, § 504 of the Rehabilitation Act.

The issue of whether a mental patient is entitled to State-provided treatment in the least restrictive environment, instead of in an institution, has been vigorously litigated on numerous grounds for over twenty years. See, e.g., *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 24 (1981) (treatment in the least restrictive environment would create an "enormous financial burden" and a

"massive obligation" on States). This Court has never addressed this issue under the ADA.

Until recently, almost all of the lower courts had found that neither § 504 of the Rehabilitation Act of 1973² nor the ADA required the States to provide mental treatment in a community placement simply because it was possible, appropriate, or even better than institutional treatment. By 1993, three circuit courts, numerous district courts, and one state supreme court had expressly found that the plaintiff must show discrimination, based on the plaintiff's disability relative to other disabled persons receiving community services, in order to state a claim.³ No court had found that institutional treatment of a mentally disabled individual constituted discrimination

² 29 U.S.C. § 794 (1994). Congress intended that the public services section of the ADA adhere closely to § 504. See Preamble, 28 C.F.R. Pt. 35, App. A, at 448-9 (1997).

³ Circuit courts: *P.C. v. McLaughlin*, 913 F.2d 1033 (2d Cir. 1990); *Clark v. Cohen*, 794 F.2d 79 (3rd Cir. 1985), cert. denied, 479 U.S. 962 (1986) (later limited in *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir.), cert. denied, 516 U.S. 813 (1995)); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983). District courts: *Conner v. Branstad*, 839 F. Supp. 1346 (S.D. Iowa 1993); *Jackson v. Fort Stanton Hosp. and Training Sch.*, 757 F. Supp. 1243 (D.N.M. 1990), rev'd in part on other grounds, 964 F.2d 980 (10th Cir. 1992); *S.H. v. Edwards*, No. C81-877A (N.D. Ga. 1987) (reprinted at 860 F.2d 1046-1053), aff'd, 860 F.2d 1045 (11th Cir. 1988), reh'g en banc denied, 866 F.2d 1420 (11th Cir. 1989), cert. denied, 491 U.S. 905 (1989), reh'g en banc granted and panel opinion vacated, 880 F.2d 1203 (11th Cir. 1989), aff'd apparently on other grounds, 886 F.2d 292 (11th Cir. 1989) (distinguished by panel in present case, App. A, infra, 19a). State courts: *Williams v. Secretary of Executive Office*, 609 N.E.2d 447 (Mass. 1993) (distinguished in *Helen L.*, *supra*). But see *Halderman v. Pennhurst State Sch. & Hosp.*, 784 F. Supp. 215, 224 (E.D.Pa. 1992), aff'd, 977 F.2d 568 (3d Cir. 1992).

under § 504 or the ADA, simply because treatment in the community might also be appropriate.

In 1995, however, the Third Circuit held that treatment of an individual in a nursing home constituted discrimination *per se* under the ADA, if the state could also provide treatment through its home-based attendant care program. *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995), cert. denied sub nom. *Pennsylvania Secretary of Pub. Welfare v. Idell S.*, 516 U.S. 813 (1995). The Court relied primarily on its interpretation of the so-called "integration regulation" for its finding. 28 C.F.R. § 35.130(d) (1997) (App. D, *infra*, 45a).

The Eleventh Circuit's decision in this case closely followed the Third Circuit's rationale. The Eleventh Circuit ignored the opposing authority cited above, because those cases did not consider the integration regulation. App. A, *infra*, 19a. However, that regulation had been issued in 1978, and prior to *Helen L.* no court had ever interpreted it to find that the ADA or § 504 placed an obligation on the States to provide certain kinds of treatment to the disabled.

In the short time since *Helen L.* was decided, it has been widely cited for its interpretation of the ADA.⁴ At least five district courts have cited *Helen L.* for its specific holding that institutional treatment constitutes discrimination *per se* under the integration regulation. Of those five district courts, two have found for plaintiffs based on the *per se* discrimination interpretation without a separate

finding of discrimination,⁵ two have relied instead on a showing of discrimination among disability groups,⁶ and one has relied on both interpretations.⁷ In light of the split in the circuit courts on this issue, and the current activity in the district courts, the federal courts most certainly will continue to be faced with the question of the proper interpretation of the ADA. This Court should accept certiorari of this important decision now, rather than to delay and allow this confusion, with its disruption of state planning and budgeting, to continue.

Clearly, the seventeen disability organizations that signed the two amicus briefs below on behalf of the plaintiffs believe that the court of appeals' decision is of far-reaching importance.⁸ Additionally, it is expected that

⁵ *Kathleen S. v. Department of Pub. Welfare*, 1998 U.S. Dist. LEXIS 11819 (E.D.Pa. 1998) (unreported); *Charles Q. v. Houstoun*, 1997 U.S. Dist. LEXIS 17305 (M.D.Pa. 1997) (unreported).

⁶ *Cable v. Department of Developmental Services*, 973 F. Supp. 937 (C.D.Cal. 1997); *Messier v. Southbury Training Sch.*, 916 F. Supp. 133 (D.Conn. 1996).

⁷ *Williams v. Wasserman*, 937 F. Supp. 524 (D.Md. 1996).

⁸ American Ass'n. on Mental Retardation, Network of Community Options and Resources, American Disabled for Attendant Programs Today, The Arc of the United States, Brain Injury Ass'n., Joseph P. Kennedy Foundation, Mental Health Ass'n. of Ga., Mental Health Ass'n. of Metro Atlanta, National Alliance for the Mentally Ill, National Ass'n. of Protection and Advocacy, National Council on Independent Living, National Mental Health Ass'n., NE Ga. Coalition of Disability Advocates, Statewide Independent Living Council of Ga., Advocacy Center for Persons With Disabilities, Ala. Disability Advocacy Program, and Ga. Advocacy Office.

⁴ Shepard's citations showed "170 Citing References" to *Helen L.*, *supra*, on September 15, 1998.

the Department of Justice will seek national enforcement of the Third and Eleventh Circuit's interpretations of the ADA. Thus, the "per se discrimination" interpretation will have national impact.

This Court should not wait until after the case has been remanded. The State should not be required to prove that providing community treatment for plaintiffs would require a fundamental alteration to the State's programs, because plaintiffs have failed at the outset to establish that they suffered discrimination based on their disability. The fundamental issue of whether Congress intended for institutional treatment to constitute discrimination *per se* can and should be decided first.

B. THE DECISION OF THE COURT OF APPEALS VIOLATES IMPORTANT PRINCIPLES OF STATUTORY CONSTRUCTION AND IS INCONSISTENT WITH RECENT DECISIONS OF THIS COURT.

This Court has recently illustrated the proper approach to interpreting the ADA in *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). "When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." ___ U.S. at ___, 118 S.Ct. at 2208, 141 L.Ed.2d at 562. As discussed above, judicial interpretations of § 504 found that it required a showing of discrimination in the provision of benefits due to a disability, and thus institutional treatment was not found to constitute discrimination *per*

se. Further, none of these cases ever suggested that the integration regulation might compel community treatment.

No formal administrative interpretation ever stated that § 504 or the integration regulation required community placement for treatment of the disabled. For example, "integration" was considered in the context of providing "equal opportunity" for disabled persons to participate in federally assisted programs for the non-disabled, not in terms of the provision of community treatment for the disabled. 43 Fed. Reg. 2132, 2134 (1978) (statement of Joseph Califano) (App. E, *infra*, 46a). Additionally, as late as 1991, the Attorney General interpreted the terms "segregation" and "integration" in the context of allowing disabled persons access to programs provided for the non-disabled, and not in the context of institutional treatment for the disabled or even discrimination among classes of the disabled. 28 C.F.R. Pt. 35, App. A, 465, 474-479 (1997) (preamble originally published in 1991) (App. F, *infra*, 47a).

Thus, the Justice Department's current litigation position conflicts with its own prior administrative interpretations, as well as with prior judicial interpretations of § 504. Since Congress substantially re-enacted § 504 in the ADA, with a specific reference to the existing regulations, it approved the regulations as they had already been interpreted. The Justice Department's current litigation position thus conflicts with congressionally-approved interpretation, and it was error for the court of appeals to defer to the Department's construction. *Reno v. Bossier Parish Sch. Bd.*, ___ U.S. ___, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997); *Miller v. Johnson*, 515 U.S. 900 (1995); *United*

States v. Board of Comm'rs of Sheffield, Ala., 435 U.S. 110 (1978). Further, the court of appeals' deference to the Department's interpretation "in this and other similar litigation . . ." (App. A, *infra*, 7a-8a) is improper, because an agency's litigation position "is entitled to little if any deference." *Gregory v. Ashcroft*, 501 U.S. 452, 485, n.3 (1991) (White, J., concurring).

Additionally, the interpretation now urged by the Department of Justice, and followed by the Third and Eleventh Circuits, relies on the Act's use of the word "institutionalization" to claim that Congress intended that institutionalization applied only to the disabled and that it constituted discrimination. 42 U.S.C. § 12101(a)(3) (1994); App. A, *infra*, 17a-18a. Yet a reading of that section *in context* shows that "institutionalization" is discrimination-neutral, just as "employment," "housing," "education," and "recreation" are discrimination-neutral. *Id.* This Court recently has made this clear, by assuming that "institutionalization" can include penal institutions. *Pennsylvania Dep't of Corrections v. Yeskey*, ___ U.S. ___, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998).

C. AS CONSTRUED BY THE COURT OF APPEALS, THE ADA CONFLICTS WITH THIS COURT'S HOLDINGS ON SECTION 5 OF THE FOUR- TEENTH AMENDMENT.

If Title II of the ADA means what the court of appeals says that it does, then a substantial constitutional issue emerges: whether the ADA, which expressly relies on the enforcement power granted to Congress in Section 5 of

the Fourteenth Amendment,⁹ 42 U.S.C. § 12101(b)(4) (1994), exceeds that power. The foundations for this issue consist of two settled principles of Fourteenth Amendment jurisprudence.

First, there is no *per se* right under the substantive component of the Due Process Clause to a community placement or a "least restrictive environment" for a mentally ill or mentally retarded person. Rather, such a placement or environment is constitutionally required only when that is the only setting in which minimally adequate care can be provided, or in other words only when the State officials' decision to place or retain a patient in a residential facility so substantially departs "from accepted professional judgment, practice, or standards as to demonstrate that the person actually did not base the decision on such judgment." *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).¹⁰ "Minimally adequate care" is the constitutional requirement, not "appropriate" care, "better" care, or care

⁹ Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

¹⁰ *Accord: Jackson v. Fort Stanton Hosp. & Training Sch.*, 964 F.2d 980, 992 (10th Cir. 1992); *P.C. v. McLaughlin*, 913 F.2d 1033, 1042 (2d Cir. 1990); *S.H. v. Edwards*, 886 F.2d 292 (11th Cir. 1989) (*en banc*), *aff'd*, No. C81-877A (N.D. Ga. 1987) (reprinted at 860 F.2d 1046-1053); *Lelsz v. Kavanagh*, 807 F.2d 1243, 1249 (5th Cir. 1987); *Phillips v. Thompson*, 715 F.2d 365, 368 (7th Cir. 1983); *Association for Retarded Citizens of North Dakota v. Olson*, 713 F.2d 1384, 1392 (8th Cir. 1983), *aff'd on other grounds*, 561 F. Supp. 473, 486 (D.N.D. 1982); *Griffith v. Ledbetter*, 711 F. Supp. 1108, 1110 (N.D. Ga. 1989).

that will make patients "safer, happier, or more productive." *S.H., supra*, No. C81-877A (reprinted, 860 F.2d at 1049); *Cuomo, supra*, at 1248. This constitutional law clearly differs from the ADA, whose "core principle," according to the court of appeals, is violated "[b]y definition where, as here, the State confines an individual with a disability in an institutional setting when a community placement is appropriate. . . ." App. A, *infra*, 8a.

Second, mental disability is not a suspect or "quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985) (mental retardation); *see Heller v. Doe*, 509 U.S. 312, 318-319 (1993); *Schweiker v. Wilson*, 450 U.S. 221, 330-31 (1981). This principle, too, differs from the ADA, which expressly asserts that

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society. . . .

42 U.S.C. § 12101(a)(7) (1994). This language, of course, echoes footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 (1938), where the Court postpones considering "whether prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry." The statutory language, then, is a finding that disabled persons such as the patients here are entitled to a higher degree of protection than this Court has provided them under the Fourteenth Amendment.

With this foundation, the constitutional issue becomes clear. As the Court held in *City of Boerne v. Flores*, 521 U.S. ___, ___ 117 S.Ct. 2157, 2164, 138 L.Ed.2d 624, 638 (1997), a religious-freedom case:

The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.

The Court noted that the legislation in question exceeded Section 5 because its "sweeping coverage ensures its intrusion at every level of government" and because it "was designed to control cases and controversies." 521 U.S. at ___, ___ 117 S.Ct. at 2170, 2172, 138 L.Ed.2d at 646, 649.

The present case concerns alleged discrimination against a classification of persons for which the Fourteenth Amendment provides no extraordinary protection. The text of the ADA attempts to provide such protection anyway. It also, in the view of the court of appeals, creates an essentially *per se* right to community placement, contrary to the Fourteenth Amendment. Finally, the ADA imposes the duty to implement this right on every State and local government, despite the long history of State and local control of public services for persons with mental disabilities. The court of appeals' opinion in this case thus profoundly disturbs the delicate balance

between the national government and the State governments, and in doing so seriously conflicts with this Court's careful calibration of that balance. Plenary review is thus required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

L.C., by Jonathan ZIMRING as guardian ad litem and next friend; E.W., Plaintiffs-Appellees, v. Tommy OLMSTEAD, Commissioner of the Department of Human Resources; Richard Fields, Superintendent of Georgia Regional Hospital at Atlanta; Earnestine Pittman, Executive Director of the Fulton County Regional Board, all in their official capacities, Defendants-Appellants.

No. 97-8538.

April 8, 1998, Decided

SUBSEQUENT HISTORY: Rehearing En Banc Denied July 1, 1998, Reported at: 1998 U.S. App. Lexis 20760.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Georgia. (No. 1:95-CV-1210-MHS). Marvin H. Shoob, District Judge.

DISPOSITION: Judgment of the district court AFFIRMED and case REMANDED for further proceedings consistent with this opinion.

COUNSEL: For APPELLANT(S): Office of the State Attorney General, William F. Amideo, Atlanta, GA. Patricia Downing, Atlanta, GA. Jefferson James Davis, Decatur, GA.

For APPELLEE(S): Susan C. Jamieson, Atlanta Legal Aid Society, Decatur, GA. Steven D. Caley, Atlanta Legal Aid Society, Atlanta, GA.

JUDGES: Before TJOFLAT and BARKETT, Circuit Judges, and PROPST*, Senior District Judge.

OPINION: BARKETT, Circuit Judge:

Tommy Olmstead, Richard Fields, and Earnestine Pittman, (collectively "the State"), defendants in the district court, appeal an adverse summary judgment granting declaratory and injunctive relief to plaintiffs L.C. and E.W.¹, two patients then-housed in a state psychiatric hospital.² In May 1995, L.C. filed this action challenging

* Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

¹ As the district court did, we use the pseudonyms L.C. and E.W. in order to protect plaintiffs' identities.

² Both L.C. and E.W. are currently being treated in community-based programs. L.C. was placed in a community-based program in February 1996, while this action was pending in the district court; E.W. was placed in a similar program after the district court entered its judgment. Nonetheless, this case is not moot. Mootness has been defined as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness).' *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 1209, 63 L. Ed. 2d 479 (1980) (quoting Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973)). As the district court concluded, L.C.'s suit falls under the exception for cases that are "capable of repetition, yet evading review." L.C. has been confined eighteen different times at the same psychiatric hospital, GRH-A and her current placement has been unstable at times due to the State's failure to provide adequate funding. Therefore, it is likely that L.C. may be returned to GRH-A. Further, because of the complexity of the issues involved and instability of her placements, it is likely that any future claim for relief will evade our review. See *Honig v. Doe*, 484 U.S. 305, 318-23, 108 S. Ct. 592, 601-04, 98 L. Ed. 2d 686

her continued confinement at the Georgia Regional Hospital in Atlanta ("GRH-A"), a psychiatric hospital where persons with mental disabilities are cared for in a segregated environment. The State's failure to provide her with care in the most integrated setting appropriate to her needs, she argued, violated Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134 (1995), the Attorney General's Title II regulations, 28 C.F.R. § 35.130 (1997), and the Due Process Clause of the Fourteenth Amendment. In January 1996, E.W., a patient also confined at GRH-A, intervened in this action, raising identical claims.

In granting summary judgment in favor of L.C. and E.W., the district court declared that the State's failure to place them in an appropriate community-based treatment program, instead confining them at the state hospital, violates the anti-discrimination provision of Title II of the ADA, 42 U.S.C. § 12132, and its accompanying regulations. The district court enjoined the State from violating plaintiffs' rights under the ADA, determined that the denial of community placements could not be justified by the State's purported lack of funds, and ordered the State to release E.W. to an appropriate community-based treatment program and to provide L.C. with all appropriate

(1988); *Lynch v. Baxley*, 744 F.2d 1452, 1456-57 (11th Cir. 1984). As to E.W., because the State only placed her in a community-based treatment program under court order, it is likely that, absent the court order, the State might revert to its prior practices. See *Vitek v. Jones*, 445 U.S. 480, 486-87, 100 S. Ct. 1254, 1260-61, 63 L. Ed. 2d 552 (1980). Further, like L.C., E.W. has been subject to multiple and unstable placements at GRH-A, making her claim one that is capable of repetition, yet evading review.

services necessary to maintain her current placement in a community-based treatment program.

We affirm the district court's judgment that the State discriminated against L.C. and E.W. by confining them in a segregated institution rather than in an integrated community-based program. However, we remand this case to the district court for further findings related to the State's defense that the relief sought by plaintiffs would "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).³

DISCUSSION

This case presents the question, one of first impression in this circuit, whether § 12132 of the ADA and the Department of Justice's integration regulation, 28 C.F.R. § 35.130(d), prohibit a state from confining a disabled individual in a state-run institution where that individual could be appropriately treated in a more integrated community setting. The State's principal argument is that the district court's application of § 12132 and its accompanying regulations is contrary to the ADA's requirement that a plaintiff prove that he or she faced discrimination "by reason of such disability." § 12132. The State contends that L.C. and E.W. have not shown that they were denied community placements available to non-disabled individuals because of disability. In other words, the State argues

³ The State also claims that it was entitled to summary judgment on plaintiffs' constitutional claims. Because the district court did not consider these claims, we decline to do so as well. *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1232 (11th Cir. 1985).

that the ADA requires a comparison of the treatment of individuals with disabilities against that of healthy non-disabled persons. However, as the State must concede, the confinement of L.C. and E.W. at GRH-A is attributable to their disabilities, thereby proving the very element the State argues is missing. Reduced to its essence, the State's argument is that Title II of the ADA affords no protection to individuals with disabilities who receive public services designed only for individuals with disabilities.

The State has not pointed to any legal authority that supports such a reading of Title II of the ADA and its integration regulation, § 35.130(d), and we can find none. To the contrary, we find overwhelming authority in the plain language of Title II of the ADA, its legislative history, the Attorney General's Title II regulations, and the Justice Department's consistent interpretation of those regulations, to support L.C. and E.W.'s position.

We analyze the applicability of the ADA and its regulations first by discussing the plain language of Title II of the ADA and § 35.130(d), the integration regulation, and the Attorney General's interpretation of that language. We then consider, in light of congressional intent, the State's argument that, notwithstanding the plain language of § 35.130(d) and the Attorney General's interpretation of that regulation, the ADA does not apply in these circumstances. We next address the State's secondary argument that certain disputed issues of fact preclude summary judgment. Finally, we consider the State's argument that funding limitations preclude it from complying with the ADA.

I.

Title II of the ADA prohibits discrimination against individuals with disabilities in the provision of public services by state and local governments. Section 12132 provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." § 12132.

Under the statutory scheme of Title II, Congress entrusted the Attorney General with the authority to define the scope of the prohibitions set forth in § 12132. In § 12134 of the ADA, Congress directed the Attorney General to promulgate regulations further defining Title II's anti-discrimination mandate. See 42 U.S.C. § 12134(a); H.R. Rep. 101-485, pt. 3 at 52 (1990) ("Title II does not list all the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited."). Congress additionally mandated that the Attorney General's regulations, except with regard to program accessibility, existing facilities, and communications issues, be "consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations . . . applicable to recipients of Federal financial assistance under [section 504 of the Rehabilitation Act]." 42 U.S.C. § 12134(b).⁴

⁴ Section 504 of the Rehabilitation Act, in turn, provides that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability,

In response to this congressional mandate, the Attorney General issued regulations defining the forms of discrimination prohibited by Title II of the ADA. Because Congress left to the Attorney General the task of giving meaning to § 12132's broad prohibition on discrimination in public services, the Attorney General's regulations must be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984); *Bledsoe v. Palm Beach County Soil & Water Conserv. Dist.*, 133 F.3d 816, 822-23 (11th Cir. 1998); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996); *Helen L. v. DiDario*, 46 F.3d 325, 331-32 (3d Cir. 1995).

Under the Attorney General's Title II implementing regulations, "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). There can be little question that the plain language of § 35.130(d) prohibits a state from providing services to individuals with disabilities in an unnecessarily segregated setting. See 28 C.F.R. Pt. 35, App. A at 478 (interpreting § 35.130(d) to require placement "in a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible"). In participating in this and other

be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a) (1995).

similar litigation, the Attorney General has consistently adopted this interpretation of § 35.130(d), and, as such, it is entitled to substantial deference. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386-87, 129 L. Ed. 2d 405 (1994); *University Health Servs., Inc. v. Health & Human Servs.*, 120 F.3d 1145, 1150 (11th Cir. 1997).

By definition, where, as here, the State confines an individual with a disability in an institutionalized setting when a community placement is appropriate, the State has violated the core principle underlying the ADA's integration mandate. Placement in the community provides an integrated treatment setting, allowing disabled individuals to interact with non-disabled persons – an opportunity permitted only in limited circumstances within the walls of segregated state institutions such as GRH-A. The State does not seriously contend otherwise. Nor does it even attempt to show that the Attorney General's interpretation is "plainly erroneous or inconsistent with the regulation" as it must to overturn her construction of § 35.130(d). *Thomas Jefferson*, 512 U.S. at 512, 114 S. Ct. at 2386 (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S. Ct. 792, 801, 13 L. Ed. 2d 616 (1965)).

Because the express terms of § 35.130(d), supported by the Attorney General's consistent interpretation, plainly prohibit a state from treating individuals with disabilities in a segregated environment where a more integrated setting would be appropriate, we can only reverse the district court's finding that the State's actions in this case constituted discrimination within the meaning of the ADA by holding § 35.130(d) invalid. Thus, we turn to the State's argument that § 12132's requirement

that a disabled plaintiff prove that he or she faced discrimination "by reason of such disability" precludes application of the ADA in the circumstances presented here.

II.

After review, we are unable to credit the State's argument that the ADA does not bar a state from providing public services for individuals with disabilities in a segregated manner because every indication of congressional intent confirms that the ADA applies to the circumstances presented here. As noted earlier, in passing the ADA, Congress mandated that the Attorney General promulgate regulations consistent with the coordination regulations issued pursuant to § 504 of the Rehabilitation Act. Congress' decision to incorporate the § 504 coordination regulations is particularly significant here. The Attorney General's § 504 coordination regulations mandate that recipients of federal financial assistance "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d) (1997) (emphasis added). By requiring the Attorney General to follow the § 504 coordination regulations – including the explicit integration requirement – Congress expressly mandated that individuals with disabilities receive public services in the most integrated setting appropriate to their needs. Conforming to this mandate, § 35.130(d) tracks this very language.⁵

⁵ In line with § 12134(b)'s mandate to promulgate regulations consistent with other parts of the ADA, the Attorney General's Title II regulations are also consistent with

It is well-settled that where “a Congress that re-enacts a statute voices its approval of an administrative . . . interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby.” *United States v. Board of Comm’rs of Sheffield, Ala.*, 435 U.S. 110, 134, 98 S. Ct. 965, 980, 55 L. Ed. 2d 148 (1978); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569, 576-77, 97 S. Ct. 850, 855-56, 51 L. Ed. 2d 48 (1977). Although Title II of the ADA did not re-enact § 504 of the Rehabilitation Act, the plain language of the ADA makes clear that Congress ratified the Attorney General’s § 504 coordination regulations and sought to ensure that the Attorney General’s Title II regulations tracked the § 504 coordination regulations. Under these circumstances, both sets of regulations, including the integration provisions, have the force of law. *Helen L.*, 46 F.3d at 332; *Messier v. Southbury Training Sch.*, 916 F.Supp. 133, 141 (D.Conn. 1996).

Congress’ determination that public services be provided in the most integrated setting appropriate to the needs of individuals with disabilities is likewise reflected in the ADA’s congressional findings and the Act’s legislative history. The Act’s findings and legislative history make clear that Congress sought to eliminate the segregation of individuals with disabilities in passing the ADA.

the provisions of Title III. See 42 U.S.C. § 12182(b)(1)(B) (1995) (“Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”).

In enacting the ADA, Congress determined that discrimination against individuals with disabilities persists in a wide variety of areas of social life, including “institutionalization,” 42 U.S.C. § 12101(a)(3) (1995), and that “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . [and] segregation. . . .” 42 U.S.C. § 12101(a)(5); see also 42 U.S.C. § 12101(a)(2) (“Historically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”).

Indeed, the legislative history makes clear that Congress considered the provision of segregated services to individuals with disabilities a form of discrimination prohibited by the ADA. See S.Rep. No. 101-116 at 20 (1989) (noting “compelling need to provide a clear and comprehensive national mandate . . . for the integration of persons with disabilities into the economic and social mainstream of American life”); H.R.Rep. No. 101-485, pt. 2 at 29 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 310 (listing “segregation” as a form of “discrimination against people with disabilities”); H.R. Rep. No. 101-485, pt. 3 at 26 (1990), reprinted in 1990 U.S.C.C.A.N. at 449 (“The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.”). Noting that “the purpose of Title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life,” id. at 49-50, reprinted in 1990 U.S.C.C.A.N. at 472-73, the

House Committee on the Judiciary explained that "integrated services are essential to accomplishing the purposes of Title II. . . . Separate-but-equal services do not accomplish this central goal and should be rejected." *Id.* at 50, reprinted in 1990 U.S.C.C.A.N. at 473. Indeed, drawing an analogy to the segregation of African-Americans, the House Report noted that "segregation for persons with disabilities 'may affect their hearts and minds in a way unlikely ever to be undone.'" *Id.* at 26, reprinted in 1990 U.S.C.C.A.N. at 448-49 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 494, 74 S. Ct. 686, 691-92, 98 L. Ed. 873 (1954)). Certainly, the denial of community placements to individuals with disabilities such as L.C. and E.W. is precisely the kind of segregation that Congress sought to eliminate.

Accordingly, because § 35.130(d) finds direct support in the plain language of the ADA, its congressional findings, and the Act's legislative history, we must apply it here. See *Bledsoe*, 133 F.3d at 823 (deferring to ADA's Title II regulations); *Harris*, 102 F.3d at 521 ("We cannot disregard the interpretive guidance contained in the appendix prepared by the federal agency charged with enforcing the ADA, when that guidance is based on a permissible construction of the statute and is supported by the statute's legislative history.").

We see nothing in the ADA's requirement that discrimination be "by reason of such disability" that warrants a different result. The fact that L.C. and E.W. seek community-based treatment services that only disabled persons need does not foreclose their claim that they were unnecessarily segregated. The ADA does not only mandate that individuals with disabilities be treated the

same as persons without such disabilities. Underlying the ADA's prohibitions is the notion that individuals with disabilities must be accorded reasonable accommodations not offered to other persons in order to ensure that individuals with disabilities enjoy "equality of opportunity, full participation, independent living, and economic self-sufficiency. . . ." § 12101(a)(8); see *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (describing "the basic goal of the ADA" as "ensuring that those with disabilities can fully participate in all aspects of society"). This principle, explicit in the text of the Act's employment provisions in Title I, see 42 U.S.C. § 12112(b)(5)(A) (1995), and the Title II regulations, runs throughout the ADA. See *Bledsoe*, 133 F.3d at 820-25 (applying Title I reasonable accommodation mandate to Title II).

For example, under Title I of the ADA, employers may not terminate individuals with known disabilities who can perform the essential functions of the job with a reasonable accommodation even though the employer need not offer similar accommodations to nondisabled employees. See *Harris*, 102 F.3d at 519 (noting that the ADA "operates to create an affirmative duty for employers to reasonably accommodate individuals with disabilities"); see also *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1021-22 (7th Cir. 1997) (noting that the "ADA encompasses two distinct types of discrimination": "treating a 'qualified individual with a disability' differently because of the disability, i.e. disparate treatment" and "failing to provide a reasonable accommodation"). The employer's failure to live up to its duty to provide a reasonable accommodation is unlawful disability-based discrimination. See *Stewart v. Happy Herman's Cheshire*

Bridge, Inc., 117 F.3d 1278, 1285 (11th Cir. 1997) (“[A] qualified individual with a disability may be unlawfully discriminated against because of the individual’s disability when the individual’s employer does not reasonably accommodate the disability – unless such an accommodation would impose an undue hardship on the employer.”); see also *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1224 (11th Cir. 1997) (noting that the ADA defines discrimination to include failure to make reasonable accommodations to a qualified individual with a disability).

Here, the Attorney General, guided by Congress’ explicit approval of the § 504 coordination regulations, imposed a duty analogous to the reasonable accommodation mandate in the employment setting. This duty requires states to place individuals with disabilities in the most integrated setting appropriate to their needs when receiving services for their disabilities in order to ensure that they become integrated into communities, not isolated from the rest of our society in state-run institutions. Under § 35.130(d), the failure to provide the most integrated services appropriate to the needs of disabled persons constitutes unlawful disability-based discrimination – even though such services may not be needed by non-disabled individuals – because such segregation perpetuates their status as second-class citizens unfit for community life. As the Third Circuit explained in holding that the unnecessary segregation of disabled persons violates Title II of the ADA, “the ADA is intended to ensure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner that shunts them aside, hides, and ignores them.” *Helen*

L., 46 F.3d at 335; see also *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 461-64, 105 S. Ct. 3249, 3265-67, 87 L. Ed. 2d 313 (1985) (Marshall, J., concurring in part and dissenting in part) (surveying history of “segregation and discrimination” against mentally retarded persons).⁶

Further, the State’s position is inconsistent with Congress’ direction to promulgate regulations consistent with the § 504 coordination regulations. These regulations impose a duty to provide the most integrated services

⁶ Nothing in the Supreme Court’s decision in *Traynor v. Turnage*, 485 U.S. 535, 108 S. Ct. 1372, 99 L. Ed. 2d 618 (1988), is to the contrary. In *Traynor*, the Court held that § 504 of the Rehabilitation Act did not impliedly repeal an Act of Congress permitting veterans to delay using their “GI Bill” educational benefits past the statutory time limit because of a disability that was not the result of their own willful misconduct. In upholding the willful misconduct limitation, the Court found “nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons,” *id.* at 549, 108 S. Ct. at 1382-83, holding that Congress could choose to deny the benefit to veterans “because they engaged in some degree of wilfulness in the conduct that caused them to become disabled.” *Id.* at 550, 108 S. Ct. at 1383. Here, the issue is not whether benefits accorded to one group of disabled persons must be extended to all others, without regard to the individual’s responsibility for the conduct that caused the disability, but whether a State may provide services to individuals with disabilities in an unnecessarily segregated setting in the face of a clear congressional mandate requiring integrated services. Nothing in *Traynor* requires us to validate the unnecessary segregation at issue here. See *Helen L.*, 46 F.3d at 335-36; *Messier*, 916 F.Supp. at 142 n. 7; *Martin v. Voinovich*, 840 F.Supp. 1175, 1191 (S.D.Ohio 1993).

appropriate irrespective of any difference between services provided to individuals with disabilities and individuals without disabilities. Under the § 504 coordination regulations, no showing of differential treatment is required; the integration regulation, on its face, applies to all services provided by a public entity. Significantly, Congress did not require the Attorney General to follow other agency regulations that require integration only where differential treatment exists between individuals with disabilities and individuals without disabilities. See 45 C.F.R. § 84.4(b)(2) (1997) (Department of Health and Human Services) (requiring recipients of federal financial assistance from the agency to "afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement [as nonhandicapped persons], in the most integrated setting appropriate to the person's needs"); see also 34 C.F.R. § 104.4(b)(2) (1997) (Department of Education) (same). In making this choice, Congress decided that the unnecessary segregation of individuals with disabilities violates the ADA even absent a showing of differential treatment between individuals with disabilities and nondisabled persons. The State's position would effectively nullify Congress' choice to mandate the more demanding integration requirement contained in the § 504 coordination regulations.

Furthermore, a separate section of both the § 504 coordination regulations and the ADA Title II regulations prohibits a public entity from providing "different or separate" services to individuals with disabilities or a class of individuals with disabilities from those provided to other persons unless necessary to provide qualified

disabled individuals with services "that are as effective as those provided to others." 28 C.F.R. § 35.130(b)(1)(iv); 28 C.F.R. § 41.51(b)(1)(iv). The State's claim that § 35.130(d) also requires a showing of differential treatment between disabled and nondisabled persons would render the prohibitions contained in § 35.130(b)(1)(iv) redundant – an interpretation we must strive to avoid. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837, 108 S. Ct. 2182, 2189, 100 L. Ed. 2d 836 (1988) (declining "to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"); *Cammarano v. United States*, 358 U.S. 498, 505, 79 S. Ct. 524, 529, 3 L. Ed. 2d 462 (1959) (rejecting construction of regulation that would render a phrase "pure surplusage").

Moreover, the State's interpretation of Title II would undermine the congressional intent to end the exclusion and segregation of individuals with disabilities, as expressed in § 12101 and the ADA's legislative history. In light of Congress' recognition that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization," § 12101(a)(3), the State's interpretation of Title II runs directly counter to Congress' stated purposes and must be rejected. See *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1074 (11th Cir. 1996) (rejecting interpretation of the ADA because it "cannot be reconciled with . . . [the Act's] stated purpose"), cert. denied, ___ U.S. ___, 117 S. Ct. 1819, 137 L. Ed. 2d 1028 (1997). As the Third Circuit pointed out in *Helen L.*, "[i]f Congress were only concerned about disparate treatment of the disabled as compared to their non-disabled counterparts, this statement would be a non-

sequitur as only disabled persons are institutionalized." 46 F.3d at 336.

Further, while the State did not deny L.C. and E.W. community-based placements out of a malevolent intent to segregate them from the community, their indifference to L.C. and E.W.'s needs – manifested by their refusal to place them in the community while recognizing the propriety of such a placement – is exactly the kind of conduct that the ADA was designed to prevent. In *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985), surveying the legislative history of the Rehabilitation Act, the precursor of the ADA, the Supreme Court explained that Congress sought to do far more than merely outlaw invidious discrimination against the handicapped.

Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect. Thus, Representative Vanik . . . described the treatment of the handicapped as one [sic] the country's "most shameful oversights," which caused the handicapped to live among society "shunted aside, hidden, and ignored." . . . Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.

Id. at 295-96, 105 S. Ct. at 717 (footnotes omitted) (citations omitted). Indeed, Justice Marshall's opinion for the Court made clear that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act

would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296-97, 105 S. Ct. at 718. These same concerns underlie the ADA. "[T]he ADA attempts to eliminate the effects of that 'benign neglect,' 'apathy,' and 'indifference.'" *Helen L.*, 46 F.3d at 335; see also H.R. Rep. No. 101-485, pt. 3 at 50, reprinted in 1990 U.S.C.C.A.N. at 473 ("'The goal is to eradicate the invisibility of the handicapped.'") (quoting *ADAPT v. Skinner*, 881 F.2d 1184, 1204 (3d Cir. 1989) (en banc) (Mansmann, J., concurring in part and dissenting in part)). The State's failure to place L.C. and E.W. in the community thus falls squarely within the ADA's ban on disability-based discrimination.

Nor do any of the cases cited by the State require a different conclusion. The State relies heavily on our en banc decision in *S.H. v. Edwards*, 886 F.2d 292 (11th Cir. 1989) (en banc), as well as several cases decided by other circuits, see *P.C. v. McLaughlin*, 913 F.2d 1033 (2d Cir. 1990); *Clark v. Cohen*, 794 F.2d 79 (3d Cir. 1986); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983). But nothing in *S.H.* or these other cases remotely touches on the issues presented by this appeal. While it is true that we generally look to Rehabilitation Act precedents in construing the ADA, see *Duckett*, 120 F.3d at 1225 n. 1, none of the cases cited by the State involved claims under the express integration regulation of either the ADA or the § 504 coordination regulations, and therefore, those cases are inapposite here. See *Helen L.*, 46 F.3d at 333-34 (distinguishing prior Rehabilitation Act precedent on this ground).

In *S.H.*, for example, we considered "'plaintiffs' claims for relief in the nature of habilitation in the least

restrictive environment in accordance with the recommendation of professional treatment staff.' " *S.H.*, 886 F.2d at 293. *S.H.* did not involve the integration regulation of either § 504 of the Rehabilitation Act or the ADA, or a claim that plaintiffs had been unnecessarily segregated. Instead, plaintiffs' only statutory claim was that they had been impermissibly denied habilitation reviews. The district court denied this claim, finding that the legislature's use of a chronological bright-line to trigger habilitation reviews did not evidence discrimination solely because of disability. See *S.H. v. Edwards*, 860 F.2d 1045, 1052 (11th Cir. 1988) (district court opinion attached as appendix A). It is far from clear whether our two paragraph *en banc* decision even considered plaintiffs' Rehabilitation Act claim.

Finally, we also reject the State's suggestion that L.C. and E.W.'s ADA claim must fail because the denial of community-based placements was based on a lack of funds, not on L.C. and E.W.'s disabilities. Under the ADA, as under Title VII of the Civil Rights Act, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy. . . ." *International Union, UAW v. Johnson Controls*, 499 U.S. 187, 199, 111 S. Ct. 1196, 1203-04, 113 L. Ed. 2d 158 (1991). Even if the State failed to place L.C. and E.W. in the community because of a lack of funding, this motive does not lessen the "discriminatory character" of their segregation. *Id.* Moreover, the plain language of the ADA's Title II regulations, as well as the ADA's legislative history, make clear that Congress wanted to permit a cost defense only in the most limited of circumstances. The ADA's Title II regulations permit a state to justify its failure to

make reasonable accommodations for individuals with disabilities where those accommodations "would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).⁷ As the House Judiciary report explained,

The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act, or under this title. . . . The existence of such programs can never be used as a basis to . . . refuse to provide an accommodation in a regular setting.

H.R. Rep. No. 101-485, pt. 3 at 50, reprinted in 1990 U.S.C.C.A.N. at 473. The State's argument that its lack of funds makes its refusal to provide integrated services non-discriminatory is inconsistent with the ADA's statutory scheme and would permit a public entity to justify its refusal to comply with the ADA by asserting that it lacked the money to do so.

We emphasize that our holding does not mandate the deinstitutionalization of individuals with disabilities. Instead, we hold that where, as here, a disabled individual's treating professionals find that a community-based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting – the most integrated setting appropriate to that patient's needs. Where there is no such finding, on the other hand, nothing in the ADA requires the deinstitutionalization of that patient.

⁷ We consider the applicability of this defense in part IV.

III.

The State also argues that the district court erred in granting summary judgment to E.W. because there is a disputed issue of fact regarding whether E.W. could be placed in a community-based treatment program. We review the district court's grant of summary judgment de novo, applying the same standards as the district court. *Harris*, 102 F.3d at 518. Summary judgment is appropriate if the pleadings, depositions, and affidavits show that no genuine issue of material fact exists for trial and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). We must view all evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Harris*, 102 F.3d at 519.

The State concedes that, at times during the course of this litigation, its own experts found that E.W. could be placed in a community treatment program. However, it claims that because, at other times, those experts maintained that E.W. should receive treatment in an institutionalized setting, a genuine issue of material fact exists as to whether community-based treatment was a possibility for E.W. In particular, the State points to the statements of Dr. Gary DeBacher, the chief of the Psychology staff at GRH-A, Joseph Steed, a behavioral specialist with the Fulton County Regional Board, and Gloria Sheppard, a member of the Board's Comprehensive Evaluation Team. As the State argues, these experts found that E.W. could not be placed in the community at certain times during this litigation. At the same time, however, these experts testified that a community-based placement

would be appropriate for E.W. once her condition improved, so long as the community treatment program provided her with the necessary level of care and supervision.⁸

In light of the testimony and considering the record as a whole, we reject the State's argument that the district court's grant of summary judgment was in error. All the experts, including E.W.'s treating physician, were unanimous that E.W. could be appropriately placed in a community-based treatment program, provided that it could give E.W. the level of care and supervision she needed.⁹ The State has not suggested that such placements were not available to E.W. Indeed, they were able to find such a placement for E.W. after the district court's judgment.

⁸ The State also points to E.W.'s hospitalization at the Central State Hospital in Milledgeville, Georgia and at Grady Memorial Hospital in Atlanta in late 1996 to support the conclusion that E.W. could not be placed in the community. At that time, E.W.'s kidney functions were compromised, requiring surgery in the hospital. Although prior to the surgery, one of the State's experts, Dr. George Echols, was uncertain whether E.W. could be placed in the community after the surgery, the surgeon who performed the operation testified after the surgery that E.W.'s medical problems did not require her to remain in a state hospital.

⁹ In early 1995, the experts at GRH-A themselves recognized that E.W. could be placed outside GRH-A. They repeatedly placed her in personal care homes, providing her with a community setting for her treatment. She was not placed, however, in a community setting with the appropriate level of monitoring, and, as a result, she returned to GRH-A after extremely short stays in the community.

We do not suggest that should a trial court find that a patient, for medical reasons, needs institutionalized care, must nonetheless order placement in a community-based treatment program. We recognize that the determination whether a patient can be appropriately placed in a community-based treatment program is a fluid one, subject to change as the patient's medical condition improves or worsens. Over the course of litigation, there may be times that a patient can be treated in the community, and others where an institutional placement is necessary. But where, as here, the evidence is clear that all the experts agree that, at a given time, the patient could be treated in a more integrated setting, the ADA mandates that it do so at that time unless placing that individual would constitute a fundamental alteration in the state's provision of services. Nothing in the ADA, however, forbids a state from moving a patient back to an institutionalized treatment setting, as the patient's condition necessitates.

Under these principles, the district court correctly denied the State's motion for summary judgment. Summary judgment is not precluded here by the fact that, at earlier times in the litigation, some of the State's experts opined that E.W. could not be placed in the community immediately. None of the State's experts concluded that E.W. needed to be placed at GRH-A on a long-term basis. At most, they believed that, in the short term, continued hospitalization was necessary in order to permit E.W. to make the transition to a community-based living arrangement in a group home. Although one of the State's experts, Joseph Steed, expressed concerns that E.W. would not progress to the point where she could be

placed in the community, the evidence in the record shows that, in the spring and summer of 1996 – after Steed's initial assessment as well as the others cited by the State – GRH-A attempted to find a community placement for E.W., but could not because there were no available state Medicaid waiver funds for such a placement.

Accordingly, because the State's own professionals agreed that E.W. could be placed in a less segregated setting, the State has failed to demonstrate that there is a material issue of fact for trial as required by Fed.R.Civ.P. 56. Accordingly, the grant of summary judgment was not in error.

IV.

In Part II we rejected the State's argument that it complied with the ADA in this case because the denial of community placements to L.C. and E.W. was based on the State's lack of funds, not on plaintiffs' disabilities. We must now address whether the lack of available funding provides the State a defense to plaintiffs' ADA claim.

Notwithstanding that under the ADA and its Title II regulations the State has a duty to provide integrated services when the patient's care warrants such services, that duty is not absolute. As discussed above, the State need not provide these services if to do so would require a fundamental alteration in its programs. Under Title II, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that

making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

L.C. and E.W. have demonstrated that the State may reasonably modify its provision of services by providing treatment to them in an integrated setting. L.C. and E.W. point out that, under Georgia law, the State has the authority to transfer funds between institutional and community-based treatment programs based on need. O.C.G.A. § 37-2-5.1(c)(3) (1995). They also note that, under the federal government's Medicaid waiver program, the State may spend Medicaid funds to provide community-based care to disabled persons who would otherwise be eligible for institutionalized care. The federal government has authorized matching federal dollars for over 2100 patients in Georgia, but, in 1996, the State used only 700 of these slots. Finally, they argue that the State can provide integrated community-based services at significantly less cost than institutionalized care.

The availability of these alternate sources of funding makes L.C. and E.W.'s request for modification of the State's program of providing services to disabled persons a reasonable one "in the run of cases." *Willis*, 108 F.3d at 286 n. 2 (quoting *Barth v. Gelb*, 303 U.S. App. D.C. 211, 2 F.3d 1180, 1187 (D.C. Cir. 1993)). Accordingly, it is the State's duty to demonstrate that providing treatment to L.C. and E.W. fundamentally alters the nature of the service it provides "in the context of the particular agency's operations." *Id.*; *Helen L.*, 46 F.3d at 337; H.R. Rep. No. 101-485, pt. 3 at 51, reprinted in 1990 U.S.C.C.A.N. at 474 (noting importance of "size and budget" of the particular agency).

The State does not argue that the relief requested by L.C. and E.W. will effect a fundamental alteration by requiring it to dismantle its provision of institutionalized care to individuals with disabilities. Instead, the State argues that it lacks the funds to provide community-based services to L.C. and E.W. The district court rejected this argument, reasoning that the State could provide community-based services to L.C. and E.W. at less cost than providing institutional care for them at GRH-A. Accordingly, it found that the State's purported lack of funds to provide community-based services to L.C. and E.W. was insufficient as a matter of law to establish that providing community-based care to plaintiffs would constitute a fundamental alteration.

Under the ADA, as with other federal statutes, "inadequate state appropriations do not excuse noncompliance" with federal law. *Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 388, 396 (5th Cir. 1980) (Medicaid Act); see also *Doe v. Chiles*, 136 F.3d 709, 722 (11th Cir. 1998) (same); *Tallahassee Mem. Reg'l Med. Ctr. v. Cook*, 109 F.3d 693, 704 (11th Cir. 1997) (same). Having chosen to provide services to individuals with disabilities, the State – both the state officials charged with formulating the budget as well as the state agencies responsible for mental health services – must act "in a manner [that] comports with the requirements of [the ADA]." *Helen L.*, 46 F.3d at 339.

Our cases make clear that the ADA does not permit the State to justify its discriminatory treatment of individuals with disabilities on the grounds that providing non-discriminatory treatment will require additional expenditures of state funds. We recognized this principle in

United States v. Board of Trustees for University of Alabama, 908 F.2d 740 (11th Cir. 1990). There, we held that, considering the size of the University of Alabama's transportation budget, the University failed to show that an additional expenditure of \$15,000 to modify its bus system to reasonably accommodate individuals with disabilities would impose an undue financial hardship. The University could not simply claim that it lacked the funds to make these modifications in its bus system; rather, it could only justify its discriminatory treatment by demonstrating that its transportation budget could not be reasonably modified to take account of the needs of the disabled. In light of its "annual transportation budget of \$1.2 million," we concluded that requiring minimal additional expenditures of \$15,000 would not "cause an undue financial burden on UAB." *Id.* at 751.

The district court did not consider whether treating L.C. and E.W. would require additional expenditures and if so, whether the State had met its burden of proving that those expenditures were unreasonable in light of the State's mental health budget. Instead, it noted that the State currently provided community-based services to individuals with disabilities and that such services could be provided at less cost than segregated services. Based on these two factors, the district court concluded that the State had failed to show that providing community-based care to L.C. and E.W. would cause a fundamental alteration.

There is evidence in the record that suggests that, because of fixed overhead costs associated with providing institutional care, the State will be able to save money

by moving patients from institutionalized care to community-based care only when it shuts down entire hospitals or hospital wings, but not when it moves one or two patients from a hospital into the community. Thus, it may be that requiring the State to treat L.C. and E.W. in a community-based program will require additional expenditure of state funds.

Nonetheless, the ADA may still require the State to expend additional funds in order to provide L.C. and E.W. with integrated services. Unless the State can prove that requiring it to make these additional expenditures would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service it provides, the ADA requires the State to make these additional expenditures. Because the district court did not consider this question and because of the complexity of the factual issues concerning the funding for mental health services in Georgia, we remand this case to the district court for further proceedings on this issue. In determining whether the State can meet its burden of establishing a fundamental alteration, the district court should consider, among other things: (1) whether the additional expenditures necessary to treat L.C. and E.W. in community-based care would be unreasonable given the demands of the State's mental health budget; (2) whether it would be unreasonable to require the State to use additional available Medicaid waiver slots, as well as its authority under Georgia law to transfer funds from institutionalized care to community-based care, to minimize any financial burden on the State; and (3) whether any difference in the cost of providing institutional or community-based care will lessen the State's

financial burden.¹⁰ This list, is, of course, not exclusive. The district court may also consider any other factors it believes are relevant to the fundamental alteration inquiry.

Accordingly, the judgment of the district court is AFFIRMED and the case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B
UNITED STATES DISTRICT COURT/
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|------------------------|---|------------------------|
| L.C., by JONATHAN | : | |
| ZIMRING as guardian ad | : | |
| litem and next friend, | : | |
| Plaintiff, | : | CIVIL ACTION |
| E.W., by JONATHAN | : | 1:95-cv-1210-MHS |
| ZIMRING as guardian ad | : | (Filed March 26, 1997) |
| litem and next friend, | : | |
| Plaintiff-Intervenor, | : | |
| v. | : | |
| TOMMY OLMSTEAD, | : | |
| Director of the | : | |
| Department of Human | : | |
| Resources, et al., | : | |
| Defendants. | : | |

ORDER

This is an action for declaratory and injunctive relief brought on behalf of two mentally retarded persons, L.C. and E.W., who have been institutionalized in a state mental hospital. They allege that under rights granted them by the Americans with Disabilities Act and the Fourteenth Amendment to the United States Constitution, they are entitled to an order requiring the state to provide them care in the "most integrated setting appropriate," which they contend is a community-based treatment program rather than a state mental hospital. Before the Court

¹⁰ We note that this case is not a class action, but a challenge brought on behalf of two individual plaintiffs. Our holding is not meant to resolve the more difficult questions of fundamental alteration that might be present in a class action suit seeking deinstitutionalization of a state hospital.

are plaintiffs' and defendants' cross-motions for summary judgment as well as plaintiff E.W.'s motion for a preliminary injunction. The Court's rulings are summarized below.

Background

On May 11, 1995, plaintiff L.C., a 27-year-old mentally retarded woman who has also been diagnosed as schizophrenic, filed this action challenging her continued confinement at Georgia Regional Hospital at Atlanta ("GRH-A"), a state mental institution. L.C. names as defendants the Commissioner of the Georgia Department of Human Resources, the Superintendent of GRH-A, and the Executive Director of the Fulton County Regional Board, which is responsible for the provision of mental health and mental retardation services to residents of Fulton County.

In her complaint, L.C. alleged that, despite the professional judgment of her psychiatric treatment team that she no longer required in-patient psychiatric treatment but instead needed community residential and habilitation services, defendants had continued to confine her at GRH-A. L.C. alleged that her continued unnecessary confinement violated her rights to freedom from undue restraint, minimally adequate treatment, freedom from illegal discrimination, and placement in the most integrated setting appropriate to her needs, which were guaranteed by the Fourteenth Amendment to the United States Constitution and under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.* She sought declaratory and injunctive relief requiring, *inter*

alia, that she be released from GRH-A into a community care residential program and provided with appropriate treatment by qualified professionals.

On or about July 27, 1995, pursuant to a consent order entered in this action, defendants discharged L.C. from GRH-A to Brook Run, a state institution for treatment of the mentally retarded. On February 12, 1996, L.C. was released from Brook Run to a community support program known as "Nyasha Hands." However, L.C. contends that she is not receiving appropriate services to support her in the community and is at high risk of having problems that will cause her to be returned to GRH-A.

Meanwhile, on January 29, 1996, the Court granted the motion to intervene as plaintiff filed by E.W., a 43-year-old mentally retarded woman who has also been diagnosed with a variety of mental disorders. Like L.C., E.W. alleged that she was confined unnecessarily and inappropriately at GRH-A and sought release into a community-based residential program.

On July 12, 1996, plaintiff E.W. moved for a preliminary injunction directing defendants to release her from GRH-A to an appropriate, integrated, community setting. On August 20, 1996, plaintiffs also filed a motion for summary judgment. On August 22, 1996, defendants filed a cross-motion for summary judgment. The Court has deferred a hearing on E.W.'s motion for a preliminary injunction pending a ruling on the parties' cross-motions for summary judgment.

Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court held that this burden could be met if the moving party demonstrates that there is "an absence of evidence to support the non-moving party's case." *Id.* at 325. At that point, the burden shifts to the non-moving party to go beyond the pleadings and present specific evidence giving rise to a triable issue. *Id.* at 324.

In reviewing a motion for summary judgment, the Court must construe the evidence and all inferences drawn from the evidence in the light most favorable to the non-moving party. *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). Nevertheless, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Parties' Contentions

Plaintiffs contend that defendants have unnecessarily institutionalized and segregated them in a mental hospital rather than placing them in an appropriate, integrated community setting, and that this constitutes unlawful discrimination on the basis of their disability in violation of the ADA. Plaintiffs also allege that defendants have failed to provide them minimally adequate treatment and

habilitation and freedom from undue restraint in violation of their rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Defendants contend that L.C.'s claims are moot because she is already being treated in an adequate community placement. Defendants further argue that they have not violated E.W.'s rights under the ADA because she has been denied community placement due to inadequate funding and not due to any discrimination based on her disability. Finally, defendants contend that they have not violated E.W.'s rights under the Due Process Clause because the decision to treat her at GRH-A rather than in the community was based on the exercise of professional judgment.

Discussion

1. Mootness

After this lawsuit was filed, defendants placed L.C. in a community-based support program. However, due to a funding problem, L.C. did not receive the services intended to be provided through this program for at least several months. While it appears that the funding problem has been resolved for now, given plaintiff's history of at least eighteen prior hospitalizations at GRH-A and the questionable stability of her current placement, the Court finds that there is a significant threat of L.C.'s being returned to GRH-A. The Court concludes that plaintiff's claims are not moot because they are "capable of repetition, yet evading review." *Sultenfuss v. Snow*, 35 F.3d 1494, 1498 n.5 (11th Cir. 1994); see also *Vitek v. Jones*, 445 U.S.

480, 487 (1980); *Lynch v. Baxley*, 744 F.2d 1452, 1457 (11th Cir. 1984).

2. ADA

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To prove a violation of Title II, plaintiffs must show: (1) that they are "qualified individual[s] with a disability"; (2) that they were excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or were otherwise discriminated against; and (3) that such discrimination was "by reason of" their disability. See *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach*, 846 F. Supp. 986, 990 (S.D. Fla. 1994).

In this case, there is no dispute that plaintiffs are qualified individuals with a disability. There is also no dispute that plaintiffs can be placed in the community. As noted above, defendants have already placed L.C. in a community-based program. As for E.W., although defendants dispute whether she *should* be placed in the community, the record demonstrates that the qualified experts are unanimous in their opinion that E.W. *can* be placed in the community, and defendants concede that E.W. qualifies for community-based services.¹

¹ In a supplemental brief, defendants take the position that a recent medical problem experienced by E.W. precludes a

Defendants argue, however, that plaintiffs have failed to prove the third element of their ADA claim, i.e., that they have been discriminated against "by reason of" their disability. Defendants contend that plaintiffs have been denied community-based placements due to inadequate funding, not because of any discrimination based on their disability. The Court concludes, however, that under the ADA, unnecessary institutional segregation of the disabled constitutes discrimination *per se*, which cannot be justified by a lack of funding.

First, it is clear from the statute itself that "segregation" of individuals with disabilities is a "form[] of discrimination" that Congress intended to eliminate. 42 U.S.C. § 12101(a)(2), (3), (5). Indeed, the legislative history is replete with statements reflecting Congress's intent to prohibit unnecessary segregation of the disabled.²

Second, the regulations promulgated by the Attorney General to implement Title II plainly prohibit unnecessary institutionalization: "A public entity shall administer services, programs, and activities in the most integrated

community placement for her at this time. However, the evidence submitted by defendants does not support this conclusion. The record established that E.W.'s medical problem has been resolved by surgery and does not prevent her being placed in the community.

² For example, Senator Harkin, floor manager of the ADA in the Senate, stated that the Act "guarantees individuals with disabilities the right to be integrated into the economic and social mainstream of society; segregation and isolation by others will no longer be tolerated." 135 Cong. Rec. 19803 (1989). Plaintiffs cite numerous additional examples in their briefs.

setting appropriate to the needs of qualified individuals with disabilities."³ 28 C.F.R. § 35.130(d). The regulations also require public entities to make reasonable modifications in existing programs in order to avoid discrimination: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

Finally, in a similar case, the Third Circuit rejected an argument that continued institutionalization in a nursing home was justified by a lack of funding for an attendant care program that would permit the plaintiff to live at home. *Helen L. v. DiDario*, 46 F.3d 325 (3rd Cir.), cert. denied, 116 S. Ct. 64 (1995). Holding that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled," *id.* at 333 (footnote omitted), the court concluded that "since the Commonwealth has chosen to provide services to Idell S. under the ADA, it must do so in a manner which comports with the requirements of that statute." *Id.* at 339.

In this case, defendants contend that all available funds are being used to provide services to other disabled persons. However, there is no dispute that defendants

³ The "most integrated setting appropriate" is "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible. . . ." 28 C.F.R. Pt. 35, App. A.

already have existing programs providing community services to persons such as plaintiffs. It is also undisputed that defendants can provide services to plaintiffs in the community at considerably less cost than is required to maintain them in an institution.⁴ Thus, defendants cannot demonstrate that any fundamental alteration of their program is required in order to serve plaintiffs appropriately in the community. The fact that it may be more convenient, either administratively or fiscally, to provide services in a segregated manner does not justify defendants' failure to comply with the ADA.

For the foregoing reasons, the Court denies defendants' motion for summary judgment and grants plaintiffs' motion for summary judgment on plaintiffs' ADA claim; declares that defendants' failure to place plaintiffs in an appropriate community-based treatment program violates the ADA; permanently enjoins defendants from further violating plaintiffs' rights under the ADA; and orders defendants to comply with the ADA by releasing E.W. to an appropriate, community-based treatment program and by providing L.C. with all appropriate services necessary to maintain her current placement in such a program. In light of this ruling, the Court denies as moot plaintiff-intervenor E.W.'s motion for a preliminary injunction.

⁴ The record establishes that, on an annual basis, institutional care for the mentally retarded costs more than twice as much as community care, and that the same is true for the mentally ill.

3. Due Process

Plaintiffs also contend that their unnecessary institutionalization by defendants and defendants' failure to place them in an appropriate community-based treatment program violates the Due Process Clause of the Fourteenth Amendment, which guarantees them the right to minimally adequate treatment and freedom from undue restraint. See *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971). It appears, however, that this claim is rendered moot by the Court's grant of summary judgment to plaintiffs on their ADA claim.

First, having already determined that plaintiffs' continued institutionalization is unlawfully discriminatory under the ADA, it is unnecessary for the Court also to decide whether plaintiffs' institutional care is minimally adequate or unduly restrains their freedom in violation of the Fourteenth Amendment. Second, insofar as plaintiffs seek as a remedy for defendants' alleged Fourteenth Amendment violation a discharge to an appropriate community-based treatment program, the Court has already granted such relief in connection with the grant of summary judgment on their ADA claim. Finally, insofar as plaintiffs seek an order requiring defendants to provide them with appropriate habilitation and treatment by qualified professionals to prevent deterioration of their pre-existing skills and with the ultimate goal of integrating them into the mainstream of society, the Court has already granted such relief by ordering defendants to comply with the ADA by placing E.W. in an appropriate community-based treatment program and by providing

L.C. all appropriate services necessary to maintain her current placement in such a program.

Accordingly, the Court denies as moot both plaintiffs' and defendants' motions for summary judgment on plaintiffs' claims under the Fourteenth Amendment.

Summary

The Court GRANTS defendants' motion to extend time for filing defendants' motion for summary judgment [#58-1]; DENIES IN PART and DENIES AS MOOT IN PART defendants' motion for summary judgment [#61-1]; GRANTS IN PART and DENIES AS MOOT IN PART plaintiffs' motion for summary judgment [#59-1]; and DENIES AS MOOT plaintiff-intervenor E.W.'s motion for a preliminary injunction [#50-1].

The Court DECLARES that defendants' failure to place plaintiffs in an appropriate community-based treatment program violates Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*; PERMANENTLY ENJOINS defendants from further violating plaintiffs' rights under the ADA; and ORDERS defendants to comply with the ADA by releasing plaintiff-intervenor E.W. to an appropriate, community-based treatment program and by providing plaintiff L.C. with all appropriate services necessary to maintain her current placement in such a program.

Pursuant to Federal Rule of Civil Procedure 58(2), the Court DIRECTS the clerk to enter a final judgment in this action in the form of the preceding paragraph.

IT IS SO ORDERED, this 25th day of March, 1997.

/s/ Marvin H. Shoob
Marvin H. Shoob,
Senior Judge
United States District Court
Northern District of Georgia

APPENDIX C
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8538

L.C., by JONATHAN ZIMRING
as guardian ad litem and
next friend; E.W.,

Plaintiffs-Appellees,

versus

TOMMY OLMSTEAD, Commissioner
of the Department of Human
Resources; RICHARD FIELDS,
Superintendent of Georgia
Regional Hospital at Atlanta;
EARNESTINE PITTMAN, Executive
Director of the Fulton County
Regional Board, all in their
official capacities,

Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGES-
TION(S) OF REHEARING EN BANC
(Opinion _____, 11 Cir., 19_____, ____ F.2d ____).

(Filed July 1, 1998)

Before: TJOFLAT and BARKETT, Circuit Judges, and PROPST*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

* Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX D

28 C.F.R. § 35.130(d) (1997). A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

APPENDIX E

43 Fed. Reg. 2132, 2134 (1978) (emphasis added).

* * *

The general prohibitions against discrimination on the basis of handicap set forth in § 85.51 incorporate basic principles that the Department determined, in developing its own regulation, to be inherent in section 504. First, section 504, like other nondiscrimination statutes, prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating. And it is equal opportunity, not merely equal treatment, that is essential to the elimination of discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory. On the other hand, separate or different treatment can be permitted only where necessary to ensure equal opportunity and truly effective benefits and services. Federally assisted programs and activities must thus be provided in the most *integrated* setting appropriate to the needs of participating handicapped persons.

* * *

APPENDIX F

28 C.F.R. Pt. 35, App. A, 465, 474-479 (1997) (emphasis added).

* * *

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph (b)(1)(iv) must be read in conjunction with paragraphs (b)(2), (d), and (e). Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most *integrated* setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and *segregation* of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services regulates persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Many commenters objected to proposed paragraphs (b)(1)(iv) and (d) as allowing continued *segregation* of individuals with disabilities. The Department recognizes that promoting *integration* of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted. Nevertheless, section 504 does permit separate programs in limited circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, Congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the

Act provides for separate benefits in language similar to that in §35.130(b)(1)(iv), and section 302(b)(1)(B) includes the same requirement for "the most *integrated* setting appropriate" as in §35.130(d).

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, *integrated* activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for while they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public entity's obligation within the *integrated* program when it offers a separate program but an individual with disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the *integrated* program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the *integrated* program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the *integrated* program. The Department cannot identify categorically the level of assistance or aid required in the *integrated* program.

* * *

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv) provide that the public entity must administer services, programs, and activities in the most *integrated* setting appropriate to the needs of qualified individuals with disabilities, *i.e.*, in a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

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